SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
Petitioner,

v.

THE HANOVER SHOE, INC.,
Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Of Counsel.

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The cross-petition of petitioner, United Shoe Machinery Corporation (hereinafter United), is conditional in that United asks that the writ issue to review its various contentions only in the event that this Court grants the petition filed by The Hanover Shoe, Inc. (hereinafter Hanover) in *The Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation,* No. 335, Oct. Term, 1967.

United's conditional cross-petition does no more, we submit, than complain of alleged errors of the Court of Appeals below and does not present any special or important reasons why it should be granted. In point 6 the cross-petition even reasserts an issue raised in a separate trial before the District Court, reviewed by the Court of Appeals as a controlling question of law under Section

1292(b) of the Judicial Code and on which this Court denied certiorari in October Term 1960!

We shall, however, comment briefly on each point presented by United:

1. Point 1: "Lease-Only Was Not Adjudged a Violation," Cross-Petition pp. 8-10.

This is no more than a complaint of "an injustice to United," id. p. 9, by the decision below. United closes its eyes to the dominant thrust of Judge Wyzanski's findings and conclusions in *United States* v. *United Shoe Machinery Corporation,* 110 Fed. Supp. 295 (D. Mass. 1953), affirmed per curiam, 347 U. S. 521 (1954) (hereinafter the "Government case"), holding that it was the "lease only" policy, buttressed by the restrictive provisions of United's leases, that violated Section 2 of the Sherman Act (16a).*

No point is made as to why this "injustice to United" should be reviewed by this Court.

2. Point 2: "The Government Decree is Not Retroactive," Cross-Petition pp. 10-12.

An important item of Hanover's proof of United's monopolization of the shoe machinery trade was the final decree and certain findings and conclusions of the District Court in the Government case.

United urged in both Courts below that the decree in the Government case operated only prospectively from the date of its entry in 1953. The Court of Appeals below rejected this argument but adopted the novel concept of limited retroactivity extending only to June 10, 1946, the date of the decision of this Court in *American Tobacco Co.,* v. *United States,* 328 U. S. 781. Hanover seeks review of

* The reference is to the opinion of the Court of Appeals printed and bound with Hanover's petition for a writ of certiorari in No. 335.

this holding in No. 335 because of its important effect upon the application of the antitrust laws.

As to United's contention, no reason for review is given other than a claim of error.

3. Point 3: "The Decree-Interpretation Question Should Have Been Certified to the Court Which Entered the Decree," Cross-Petition pp. 12-17.

The principal complaint here seems to be of "The raw injustice" id. p. 15 to United of the decision of the Court of Appeals in finding the "untimeliness" of United's effort and in finding no "abuse of discretion" by the District Court in rejecting United's belated request (26a).

Nothing is presented here that requires reply.

4. Point 4: "The Legality and Reasonableness of the Leases Preclude Recovery," Cross-Petition pp. 17-18.

Here United complains only of "manifest error," id. p. 18. Again, we see no need for reply.

5. Point 5: "Reflection of Cost of Capital Would Demonstrate the Absence of Damage," Cross-Petition pp. 18-19.

The text here is no more than a complaint as to the decision of both courts below holding invalid a method of calculating damages which United claimed should have been utilized by the District Court. It requires no reply.

6. Point 6: "Any Excess of Cost of Leasing Over Cost of Ownership Was Not Absorbed by Hanover," Cross-Petition pp. 19-20.

This is an attempt to revive United's defense that Hanover suffered no damage because it passed on the

excess shoe machinery costs in the sales prices of the shoes it sold. A separate trial on this "passing-on" issue was held under Rule 42(b) of the Federal Rules of Civil Procedure before the District Court in 1960, 185 F. Supp. 826. The decision of the District Court in which the claim of United was rejected, was affirmed by the Court of Appeals, per curiam, 281 F. 2d 481 and this Court denied certiorari, 364 U. S. 901 (1960).

It is extraordinary to find United once more trying to secure a review of this issue by this Court.

7. Point 7: "Hanover's Failure to Demand Purchase of Machines Indicates Absence of Injury and Precludes Recovery," Cross-Petition pp. 20-22.

Again, this is no more than a complaint as to the decision of both courts below. It is no more than a claim of error. No grounds are stated to call for review by this Court.

8. Point 8: "Recovery is Barred by Limitations," Cross-Petition pp. 22-23.

In this last point United still complains of the decisions of both courts below. It still advances no reason why this Court should review the claimed errors.

CONCLUSION

For the foregoing reasons, United's conditional cross-petition should be denied.

Respectfully submitted,

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